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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 876

CARL EMIL LUDWIG KREPPER,
Petitioner,

vs.

THE UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

GEORGE R. SOMMER,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 876

CARL EMIL LUDWIG KREPPER,
Petitioner, Appellant below,

vs.

THE UNITED STATES OF AMERICA,
Respondent, Appellee below

PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Supreme Court of the United States:

Your petitioner respectfully shows:

I

Summary Statement of the Matter Involved

1. This is a petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit on the ground that the decision of the Circuit Court of Appeals as expressed in the opinion of that court, is in conflict with decisions in other Circuit Courts of Appeals on the same matter and on a further ground that that Court has

decided a Federal question in a way which is in conflict with the applicable decisions of this Court.

2. Petitioner was indicted in the United States District Court for the District of New Jersey on an indictment containing two counts. The first count charged that he violated the Trading with the Enemy Act, Title 50 App., U. S. C. Sec. 3 (c), in that he did unlawfully send and transmit and cause persons acting at his instigation and under his direction and control and in furtherance of a joint or common scheme or enterprise a message out of the United States which was intended to be delivered to enemies or allies of enemies of the United States. The second count charged that he did the same act as alleged in the first count, in violation of the Censorship Act of 1941, Title 50 U. S. C. App., Sec. 618.

3. Four days prior to the trial, the United States Attorney moved to amend the indictment by eliminating or striking from each count the words "in furtherance of a joint or common scheme or enterprise," which motion was granted and the words deleted were then placed in parentheses with a green pencil on the original indictment by the Court.

4. The case came on for trial before the trial court and a jury in Newark, New Jersey, on March 13, 1945. The defendant was convicted on both counts of the indictment and received a sentence of ten years on each of Counts 1 and 2, to run concurrently.

5. An appeal from the judgment was taken to the United States Circuit Court of Appeals for the Third Circuit which affirmed the judgment of the District Court on December 11, 1946.

II

Statement of the Case

The petitioner, Carl Emil Ludwig Krepper, was indicted in the United States District Court for the District of New Jersey at the November Term 1944 and was charged in an indictment containing two counts with firstly, violating Title 50 App. U. S. C. Sec. 3 (c) and secondly, with violating Title 50 App. U. S. C., Sec. 618. The original indictment alleged in both counts that what he did was "in furtherance of a joint or common scheme or enterprise." This phrase, however, was stricken from each count of the indictment by the trial court on motion of the United States Attorney. The only place in the record where the indictment appear in its original unamended form is in a footnote in the opinion of the Circuit Court of Appeals at page 5 of the opinion (R. 66).

The evidence adduced at the trial consisted of testimony by a stepdaughter-in-law of petitioner that on December 19, 1941 she wrote and mailed a letter addressed to the petitioner's wife in care of a Pastor Kloess in Barcelona, Spain, in which letter, at the request of petitioner, she advised petitioner's wife that he had arrived safely in the country. She also testified that she put in the letter, at petitioner's request, "greetings to Pastor Kaiser" but the only reason that she so testified was because at a previous trial she had heard a statement of the defendant read in which he said that he had so instructed her. The only other proof adduced by the government was a statement by the petitioner to an agent of the Federal Bureau of Investigation, in which petitioner told him that sometime in January, February or March, 1942, he had suggested that his stepdaughter-in-law advise his wife that he had arrived safely in the United States and send greetings to Pastor Kaiser

and other friends in Germany. The petitioner also told the agent of the Federal Bureau of Investigation that the term "Pastor Kaiser" meant one Walter Kappe and that any mail that was forwarded to Pastor Kloess in Barcelona, Spain, would be forwarded to his wife in Germany.

III

Jurisdiction

The jurisdiction of this Court is invoked under Section 240 (A) of the Judicial Code, as amended by Act of February 13th, 1925, c. 299, 43 Stat. 938 (28 U. S. C. 347).

IV

Questions Presented

The questions presented are:

1. Did the order of the Court striking out the words "in furtherance of a joint or common scheme or enterprise" vitiate the indictment or make it impossible for the defendant to plead *autrefois convict*?

2. Was there proof that the statute Title 50 App. U. S. C. Sec. 618 was in force and effect at the time the alleged violation occurred?

3. Was there evidence to support the charges contained in the indictment as amended?

4. Is a citizen of the United States who is temporarily living in a foreign country with which the United States is at war an enemy or ally of an enemy within the meaning of Title 50, App. U. S. C. 3(c)?

5. Did the failure to plead in the first count of the indictment as amended, the exceptions contained in the statute, invalidate this count of the indictment?

V

Reasons for Allowance of Writ

(1) The decision of the Circuit Court of Appeals in sustaining the action of the District Court in striking from each count of the indictment the words "in furtherance of a joint or common scheme or enterprise", conflicts with the decision of this Court in *Ex Parte Bain,* 121 U. S. 1 and the decision of the Circuit Court of Appeals for the Ninth Circuit in *Edgerton* v. *United States,* 143 Fed. 2d, 697.

(2) The decision of the Circuit Court of Appeals in sustaining the conviction of petitioner on count I, in view of the fact that there was no independent proof of the *corpus delicti* other than the statements of the defendant, conflicts with the decision of the Circuit Court of Appeals for the Eighth Circuit, *Tingle* v. *United States,* 38 Fed. 2d, 573 and *Gulotta* v. *United States,* 113 Fed. 2d, 683.

(3) The decision of the Circuit Court of Appeals held that the second count of the indictment, as amended, charged an offense against the United States and that the evidence supported a conviction of the offense therein alleged whereas in fact the second count of the indictment alleged that the offense occurred on December 19, 1941 and the proof was to the effect that the letter involved was mailed on December 19, 1941 in spite of the fact that the statute under which the offense was laid was not implemented by an executive order until said order was filed with the Federal Register on December 20, 1941 and therefore was not in force and effect on December 19, 1941.

(4) The decision of the Circuit Court of Appeals in holding that the wife of petitioner, a citizen of the United States temporarily living in Germany, was an enemy

within the definition of Title 50 App. U. S. C., Sec. 2, was erroneous.

(5) The decision of the Circuit Court of Apeals, in determining that it was not essential to the indictment that the exceptions contained in Title 50 App. U. S. C. Title 3(c) be pleaded therein, conflicts with the decisions of this Court in *U. S.* v. *Britton,* 107 U. S. 655, 27 L. Ed. 520 and *U. S.* v. *Cook,* 84 U. S. 168, 21 L. Ed. 538.

WHEREFORE your petitioner prays that a writ of certiorari issue out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Third Circuit commanding the said Court to certify and send to this Court for its review and determination on a day certain to be therein designated, a full and complete transcript of the record and of all the proceedings of the said Circuit Court of Appeals, in the said case entitled in that court: *United States of America* v. *Carl Emil Ludwig Krepper,* No. 9032, October Term, 1945, to the end that this case may be reviewed and determined by this Court as provided for by the statutes of the United States and that the judgment herein of the Circuit Court of Appeals be reversed by this Honorable Court, and for such other further relief as to this Court may seem proper.

CARL EMIL LUDWIG KREPPER,
By GEORGE R. SOMMER,
Attorney for and of Counsel
With Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 876

CARL EMIL LUDWIG KREPPER,
Petitioner, Appellant below,

vs.

UNITED STATES OF AMERICA,
Respondent, Appellee below

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

Opinion of the Court Below

The opinion of the Circuit Court of Appeals is set forth in the record and is not yet reported. It appears at pages 62-86 of the record.

II

Jurisdiction

(1) The jurisdiction of this Court is invoked under Section 240(A) of the Judicial Code, as amended by Act of February 13th, 1925, c. 299, 43 Stat. 938 (28 U. S. C. 347).

(a) The judgment of the Circuit Court of Appeals was entered on December 11, 1946.

III

Statement of the Case

A full statement of the case is included in the preceding petition under Title III.

IV

Statutes Involved

Section 3, paragraph (c), Title 50 App. U. S. Code:

"For any person (other than a person in the service of the United States Government or of the Government of any nation, except that of an enemy or ally of enemy nation, and other than such persons or classes of persons as may be exempted hereunder by the President or by such person as he may direct), to send, or take out of, or bring into, or attempt to send, or take out of, or bring into the United States, any letter or other writing or tangible form of communication, except in the regular course of the mail; and it shall be unlawful for any person to send, take, or transmit, or attempt to send, take, or transmit out of the United States, any letter or other writing, book, map, plan, or other paper, picture, or any telegram, cablegram, or wireless message, or other form of communication intended for or to be delivered, directly or indirectly, to any enemy or ally of enemy: Provided, however, That any person may send, take, or transmit out of the United States anything herein forbidden if he shall first submit the same to the President, or to such officer as the President may direct, and shall obtain the license or consent of the President, under such rules and regulations, and with such exemptions, as shall be prescribed by the President."

Section 618, Title 50 App. U. S. Code:

"618. *Censorship of communications; penalties and forfeitures.*

"Whenever, during the present war, the President shall deem that the public safety demands it, he may cause to be censored under such rules and regulations as he may from time to time establish, communications by mail, cable, radio, or other means of transmission passing between the United States and any foreign country he may from time to time specify, or which may be carried by any vessel or other means of transportation touching at any port, place, or Territory of the United States and bound to or from any foreign country. Any person who willfully evades or attempts to evade the submission of any such communication to such censorship or willfully uses or attempts to use any code or other device for the purpose of concealing from such censorship the intended meaning of such communication shall, upon conviction, be fined not more than $10,000, or, if a natural person, imprisoned for not more than ten years, or both; and the officer, director, or agent of any corporation who knowingly participates in such violation shall be punished by a like fine, imprisonment, or both, and any property, funds, securities, papers, or other articles or documents, or any vessel, together with her tackle, apparel, furniture, and equipment, concerned in such violation shall be forfeited to the United States."

Section 305, Title 44, U. S. C.:

"305. *Documents to be published in Federal Register; comments and news items excluded:*

(a) There shall be published in the Federal Register (1) all Presidential proclamations and Executive orders, except such as have no general applicability and legal effect

or are effective only against Federal agencies or persons in their capacity as officers, agents, or employees thereof; (2) such documents or classes of documents as the President shall determine from time to time have general applicability and legal effect; and (3) such documents or classes of documents as may be required so to be published by Act of the Congress: Provided, That for the purpose of this chapter every document or order which shall prescribe a penalty shall be deemed to have general applicability and legal effect.

(b) In addition to the foregoing there shall also be published in the Federal Register such other documents or classes of documents as may be authorized to be published pursuant hereto by regulations prescribed hereunder with the approval of the President, but in no case shall comments or news items of any character whatsoever be authorized to be published in the Federal Register. July 26, 1935, c. 417, Sec. 5, 49 Stat. 501."

Section 307, Title 44, U. S. C.:

"307. *Filing document as constructive notice, publication in Register as presumption of validity; judicial notice; citation.*

No document required under section 305 (a) of this chapter to be published in the Federal Register shall be valid as against any person who has not had actual knowledge thereof until the duplicate originals or certified copies of the document shall have been been filed with the Division and a copy made available for public inspection as provided in section 302 of this chapter; and, unless otherwise specifically provided by statute, such filing of any document, required or authorized to be published under section 305 of this chapter, shall, except in cases where notice by publi-

cation is insufficient in law, be sufficient to give notice of the contents of such document to any person subject thereto or affected thereby. The publication in the Federal Register of any document shall create a rebuttal presumption (a) that it was duly issued, prescribed, or promulgated; (b) that it was duly filed with the Division and made available for public inspection at the day and hour stated in the printed notation; (c) that the copy contained in the Federal Register is a true copy of the original; and (d) that all requirements of this chapter and the regulations prescribed hereunder relative to such document have been complied with. The contents of the Federal Register shall bo judicially noticed and, without prejudice to any other mode of citation, may be cited by volume and page number. (July 26, 1935, c. 417, sec. 7, 49 Stat. 502.)''

V

Argument

Point I

(Reason (1))

The trial court erred in granting a motion of the United States Attorney to strike from each of the two counts of the indictment the following words: "In furtherance of a joint or common scheme or enterprise."

Approximately four days before the trial of the instant case, the United States Attorney moved to have stricken from each count of the indictment the words above set forth and this motion was granted by the court.

An indictment is a charge by a Grand Jury and it sets forth the offense which the Grand Jury has determined the defendant should be tried upon.

In the instant case however ineptly drawn the indictment may be, it originally charged the defendant in one count

with a conspiracy to violate the Communications Act of 1917 and in the other count with a conspiracy to violate the Censorship Act of 1941. When the court granted the motion of the United States Attorney to strike out the words "In furtherance of a joint or common scheme or enterprise," it completely changed the indictment and changed each count from a charge of conspiracy to a substantive offense.

The Grand Jury for the District of New Jersey had returned several indictments against petitioner and among them was indictment #3000c, which charged the defendant with conspiracy to violate the Communications Act of 1917 and the Censorship Act of 1941. The Circuit Court of Appeals took judicial notice of this indictment and upon this indictment the defendant was previously tried and convicted. The action of the trial court in striking the words above referred to from the indictment prevented the petitioner from entering a plea of *autre fois convict* or double jeopardy.

The action of the trial court in striking these words from the indictment changed completely the charge as laid by the Grand Jury and, as a result thereof, vitiated the indictment. *Ex Parte Bain,* 121 U. S. 1, and *Edgerton* v. *United States,* 143 Fed. 2d 697.

Point II

(Reason (2))

There was no independent proof of the *corpus delicti* other than the statements of the defendant.

Title 50 App. U. S. C., Sec. 3 (c) prohibits sending messages to enemies or allies of enemies. The only proof adduced by Mrs. Frey's testimony, the stepdaughter-in-law of the petitioner, was that she wrote a letter to the

petitioner's wife advising her of his safe arrival, which letter was sent to Spain. We take up under Point IV whether the petitioner's wife under any circumstances could be an enemy or an ally of an enemy. The petitioner's own admission states that there was mention of a Pastor Kaiser which was intended to be one Walter Kappe. There is no proof whatsoever as to who he, Walter Kappe, was or whether he was an enemy or an ally of an enemy and the only proof that any message was sent to Walter Kappe was by the petitioner's own admission. Even if the admissions of the petitioner would tend to prove the *corpus delicti*, nevertheless some independent corroboration is necessary. Lacking this corroboration, such proof conflicts with the decisions in *Tingle* v. *United States*, 38 Fed. 2d 573 and *Gulotta* v. *United States*, 113 Fed. 2d 683.

Point III

(Reason (3))

Title 50 App. U. S. C., Sec. 618, not being in effect on December 19, 1941, no crime could have been committed as charged in Count 2 of the Indictment.

The statute above mentioned provided that it should become effective upon an Executive order of the President. The Federal Register, Volume 6, page 6625 for December 23, 1941, shows that the Executive order #8985, implementing the statute, was dated December 19, 1941, but was not filed with the Federal Register until December 20, 1941. Title 44 U. S. C., Sec. 305 provides that such an Executive order shall not be effective until the order is filed with the Federal Register.

The government's witness, Mrs. Frey, was specific in the date when the letter was written and she particularly stated that it was December 19, 1941. She also stated that

she remembered that it was a Friday and looked it up on the calendar and it must have been that date. In view of this positive testimony, the mere admission by the petitioner that in January, February or March of the following year he made some suggestions to his stepdaughter-in-law, Mrs. Frey, is not sufficient evidence to sustain Count 2 of the Indictment, in which it was necessary to prove an act done on or after December 20, 1941.

Point IV

(Reason (4))

The trial court and the appellate court erred in holding that a citizen of the United States, temporarily living in Germany was an enemy within the definition of Title 50 App. U. S. C. Sec. 2.

Count 1 of the indictment, as amended, charged that the petitioner transmitted or attempted to transmit a communication intended for or to be delivered to enemies of the United States or allies of enemies of the United States in Germany and Spain. The only message that the government proved was transmitted was a message to the petitioner's wife informing her that he had arrived safely in the United States. *There was no proof whatsoever* as to the residence or whereabouts of petitioner's wife other than a letter was sent to her in care of a person in Spain.

Title 50 App. U. S. C., Sec. 2 defines the word "enemy." Paragraph (a) of the Act says in part:

> "Any individual * * * resident within the territory * * * of any nation with which the United States is at war."

However, Paragraph C of the same section says as follows:

> "Such other individuals * * * as may be native citizens or subjects of any nation with which the United

States is at war, *other than citizens of the United States.*"

As to "ally of enemy" the definition is the same.

A reading of this statute clearly shows that the word "enemy" was not under any circumstances intended to mean a citizen of the United States wherever resident. There was proof of her citizenship which came from the government's principal witness, Mrs. Frey, who testified that her husband's mother, Mrs. Bertha Krepper, was a citizen of the United States and there was no proof that she was resident within a nation with which the United States was at war.

In view of these facts the determination of the Court that Mrs. Krepper was an enemy within the definition contained in the statute was erroneous.

Point V

(Reason (5))

The Circuit Court erred in holding that it was not essential that the exceptions contained in Title 50 App. U. S. C. Sec. 3(c) be pleaded.

The pertinent part of the statute above mentioned is as follows:

> "(c). For any person (other than a person in the service of the United States Government or of the Government of any nation, except that of an enemy or ally of an enemy nation, and other than such persons or classes of persons as may be excepted hereunder by the President or by such person as he may direct), to send * * * any letter * * * except in the regular course of mail * * *."

The first count of the indictment as amended charges a violation of this section but does not plead the exception

hereinbefore set forth and contained in parentheses in the statute, nor was there any proof offered at the trial that the defendant did not come within such exception. Such pleading was definitely of a nature which should have resulted in the trial court dismissing this count of the indictment. *United States* v. *Britton*, 107 U. S. 655; *United States* v. *Cook*, 84 U. S. 168.

Conclusion

Your petitioner respectfully submits that the Circuit Court of Appeals for the Third Circuit has failed to follow the applicable decisions of this Court and that a conflict exists between its decisions and the decisions of other Circuit Courts of Appeals and of this Honorable Court and that the questions presented by the foregoing petition should be reviewed by this Honorable Court.

Respectfully submitted,

GEORGE R. SOMMER,
Attorney for and of Counsel
With Petitioner.

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